In the Supreme Court of the United States

OCTOBER TERM, 1958.

No. 858.

HENRY J. HARRIS,

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF OF THE RESPONDENT PENNSYLVANIA RAILROAD COMPANY.

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OPINIONS BY COURTS BELOW.

The opinion of the Supreme Court of the State of Ohio is reported in 168 Ohio St. 582, 156 N. E. 2d 822 (1959), and is appended to the Petition for Certiorari as Appendix A, page 26.

The opinion of the Court of Appeals for the Eighth Appellate District of Ohio is reported in — Ohio App. —, 146 N. E. 2d 744 (1957), and is appended to the Petition for Certiorari as Appendix B, page 34.

QUESTIONS PRESENTED.

The sole question presented for review by this court is whether the general verdict for the petitioner is supported by any evidence of probative value in the record.

in view of the jury's answers to the interrogatories and its failure to find the respondent guilty of specifications of negligence (1), (2) and (4), as charged by the petitioner.

STATUTES INVOLVED.

Federal Rules of Civil Procedure Rule 49(b), 28 U. S. C. is appended hereto at page 14, and will aid the Court in evaluating the scope of Ohio Revised Code Sections 2315.16 and 2315.17.

STATEMENT.

In addition to the statement of the case contained in the Petition for Certiorari, certain additional facts ought to be set forth for the consideration of the Court.

The derailed cars, which the petitioner was assisting in rerailing, were located in the Northern Ohio Food Terminal in the City of Cleveland (R. 22-23). The derailed cars were on the tracks which make up the Food Terminal yard, and all of the tracks terminate at the terminal docks (R. 39-40). There is no evidence disclosing upon which of the several tracks the retracking operation occurred.

There were no witnesses to the incident which occasioned the petitioner's injury, and the petitioner was the only witness to testify concerning the accident. From the petitioner's testimony, his injury could have occurred in any one of three ways.

First, the petitioner's direct testimony of the manner in which the accident occurred.

"Q. And could you get a grip on it? A. I couldn't get no grip on it because it was stuck in the mud. I started to tug. I asked the boss for some help. He said 'You are a big strong man.' He said, 'We are busy. Hurry up.' So I start tugging the block, tug it and pull it, and so all at once it jump out of the mud

and I slipped on the cross-tie that I was standing next to, a tie—I couldn't get no good grip, I was so close to it. So when I slipped on the cross-tie, that is when I got that catch in my back." (R. 28.)

Second, the petitioner's deposition was taken prior to the time of trial and it was called to the petitioner's attention on cross examination wherein he testified:

"Q. At that time—this is page 20—Mr. Harris, I will ask you whether or not I asked you these questions and you gave me these answers:

Question, 'Tell us now after you started carrying that block just what happened.'

Your answer was: 'Well, I reached down to pick up the block. I got it tilted, you know, and I went to get it up to my shoulders, my foot slipped and I caught a pain in it. In my back.' Did you give that answer to that question? A. Yes.

Q. That was true, wasn't it? A. That is right.

Q. I said, question, 'You hadn't lifted the block up yet?' And your answer was: 'I got it up to my shoulder, went to straighten up with it, and my foot slipped.' Did you give that answer?

The Court: Keep your voice up.

A. Yes.

Q. That was the truth then, wasn't it? A. Yes." (R. 49.)

Third, petitioner's signed statement given a couple of days following his injury was introduced into evidence as Defendant's Exhibit 1.

"Q. Tell us just what took place. A. Part of my work was to take the blocks on my shoulder to the derrick to block the outriggers to get the derrick ready to lift the loads. I was lifting one of the blocks and I got it up off the ground and as I started to straighten up I stepped on a cross tie and my foot slipped and I felt a pain in the middle of my back." (R. 183-184).

ARGUMENT.

Reasons for Denial of the Writ.

I. THE DECISION OF THE SUPREME COURT OF OHIO DOES NOT DENY PETITIONER OF ANY FEDERAL RIGHTS.

A. The Record is Devoid of any Evidence of Negligence on the Part of the Respondent which may, with Reason, Support the General Verdict of the Jury.

The Supreme Court of Ohio held that the petitioner failed to make out a case of liability against the respondent, in that the finding of the jury in response to the interrogatories was not substantiated by the evidence. In reaching its decision on the record in this case, the Supreme Court of Ohio stated:

> "* * * we are of the opinion that plaintiff herein failed to make out a case of liability against the defendant, and that the findings of the jury with respect to negligence in response to the interrogatories submitted to it are not substantiated by the evidence."

The respondent submitted the following interrogatories to the jury (R. 182):

> "I. Was the defendant negligent?
>
> II. If your answer to Number I. is 'Yes,' state of what that negligence consisted."

The jury answered the first interrogatory in the affirmative, and the answer to the second interrogatory was copied verbatim from the specification of negligence (3) in the petition (R. 2).

1. Direct Testimony: Grease on Tie.

There is absolutely no evidence of the presence of grease or oil on the cross-tie which petitioner claims occasioned his injury. The entire Record of evidence concerning the grease on the cross-tie which allegedly caused Petitioner's injuries was elicited from Petitioner on cross-examination. On cross examination the petitioner stated (R. 55-56):

"Q. There was grease on the block? A. Grease under the mud because it was on the right side of my feet, under the shoe.

Q. How much grease was there? A. I don't know how much grease there was. There was enough for me to tell you.

Q. You didn't see any grease on that tie? A. There was mud.

Q. There was mud all around there if it was raining as hard as you say it was. A. It was raining and sleet and sloppy.

Q. So you could have picked up this mud any place? A. It would have to be on the tie.

Q. Why? A. All you can see is mud on the tie every day alongside the track.

Q. You can see mud on the tie, too? A. There was grease on the tie.

Q. How do you know? A. It was on my foot.

Q. Does that mean it was on the tie? A. There was mud on the tie.

Q. You could have picked it up any place? A. Well, I don't know.

Q. You don't know. You didn't know if it was on that tie? A. It was on the tie.

Q. You didn't see that tie? A. It was on the mud.

Q. Did you see it? A. It was over my shoe, that is the way I saw it was on there.

Q. You saw it on your shoe. Does that mean it was on the tie? A. By my picking the tie up, it

could have come from the tie, from the one I slip and fell upon.

Q. It could have come from any place around there, couldn't it? A. Well, it could have, but it was there on the tie.

Q. But you say you didn't see it on the tie? A. It was on my shoe.

Q. My question is: Then it could have come from any place around where you were walking that night? A. Well, I could say that, too, but it was on my shoe.

Q. That is the only thing you are sure of? A. That's right."

Certainly such testimony can be of no probative value to support the conclusion that there was grease or oil on the cross-tie, nor can such testimony support the conclusion that the respondent's negligence caused the grease or oil to be on the tie or permitted it to remain. The testimony of the petitioner supports equally any inference he wished, or found it convenient to draw, but such testimony can establish no logical or reasonable inference beyond a mere speculation on the part of the witness.

The petitioner cites *Rogers v. Missouri Pacific Railroad*, 352 U. S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957); *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U. S. 521, 77 S. Ct. 457 (1957); *Lavender v. Kurn, et al.*, 327 U. S. 645, 66 S. Ct. 740 (1946); and *Webb v. Illinois Central Railroad Company*, 352 U. S. 512, 77 S. Ct. 451 (1957) as the more modern decisions of this Court, which should have controlled the decision of the Ohio Supreme Court. However, neither of the cases cited by the petitioner allows the speculation on the part of the witnesses, or parties, as a substitution for the evidence of facts upon which reasonable and logical inferences may be drawn by the jury.

The only testimony in the record concerning grease or mud or oil on the cross-tie is the testimony of the petitioner quoted above, and it is admitted by the petitioner that he never looked at the tie.

2. Circumstantial Evidence: Grease on Tie.

It is urged by the petitioner that the jury could *logically* infer "that the grease which petitioner observed only on his right shoe must have been obtained while in the performance of the particular task which gave rise to his injury."

The logic of this inference it is said is to be found in the assertions that the petitioner discovered mud and grease on his right shoe, which is the shoe he had placed on the tie. The "logic" of the inference urged by the petitioner indulges the grossest kind of fortuitous speculation.

The record does not disclose the place of the occurrence of the petitioner's injury, other than generally at the Northern Ohio Food Terminal. The Food Terminal yard is composed of several separate tracks.

The evidence is equally lacking in particularity with respect to the occurrence of the petitioner's injury. The record does not disclose which foot petitioner had on the cross-tie, nor does it disclose upon which shoe he saw the grease. The inferences that the petitioner argues the jury could have drawn from the evidence are not only not logical, but contrarily, the urging of such inferences is the advocacy of the grossest kind of speculation.

The petitioner claims support for the inferences that there was grease on the cross-tie from the testimony of one of respondent's witnesses, Charles Tricska. This witness testified (R. 149):

"Q. And did you inspect that particular territory on March 29th? A. Yes, sir.

Q. And could you tell us, if you will, the results of your inspection and investigation of that area? A. I found everything all right, in good shape.

Q. Did you see anything usual there at all? A. No, sir.

Q. Was your attention directed to grease or anything on the ties? A. Well, there is some grease where we keep the switches lubricated, you cannot get away from that. You see, them switches are lubricated at least twice a week, otherwise they wouldn't be able to throw them.

Q. This oil, then, is around your switches. Did you notice anything else at all unusual about your investigation? A. No, everything was in good shape."

There is no evidence in the record that petitioner was near any of the switches in the terminal yard at the time he was injured, or at any time during the wreckage operation.

3. The Elevated Tie.

The jury, in its specific finding against the respondent, found that the tie which petitioner was "required to walk" was elevated *and* was covered by grease or oil.

It is the contention of the respondent that the elevation of the cross-tie alone does not constitute negligence or an unsafe place to work. *Nelson v. Southern Railway*, 246 U. S. 253 (1918). Indeed, to hold otherwise would surely make the respondent the insurer of the safety of its employees. See *Ellis v. Union Pacific R. Co.*, 329 U. S. 649, 67 S. Ct. 598 (1947).

The complete lack of evidence with respect to the presence of grease on the tie is set forth above. The record

is equally devoid of any evidence that petitioner was *required* to walk upon the tie, through necessity or otherwise; or, that he was even walking when he sustained his injury.

Concerning the time that the petitioner slipped, he testified (R. 66):

> "Q. We want to get where you slipped. The next thing was, I think, you tried to balance it to get it up on your shoulder? A. I was hurt then.
>
> Q. You were hurt already? A. When I slipped after the block jumped out of the mud.
>
> Q. I know the block jumped up out of mud. I know. I am trying to find out, did you slip then? A. Yes.
>
> Q. At the same time? A. Yes.
>
> * * * * *
>
> Q. But I mean after the block popped out of the mud and you straightened up with this on your shoulder, you didn't slip again? A. I didn't have the block on my shoulder when I slipped.
>
> Q. I didn't say that. I said once you straightened up and had the block on your shoulder, you didn't slip after that? A. Not after I had the block on my shoulder. I didn't slip after I had it on my shoulder."

The respondent respectfully submits that petitioner has failed to meet the burden of proof, either by direct or circumstantial evidence, from which a jury may, with reason, infer that his injuries resulted in whole or in part from any negligence of the respondent. *Rogers v. Missouri P. R. Co.*, 352 U. S. 500 (1957).

The judicial appraisal of the evidence in the record clearly falls within the narrow limits for such appraisals announced in *Rogers v. Missouri P. R. Co., supra.*

B. The Specific Finding of the Jury is Inconsistent with, and must Control the General Verdict.

In reaching its decision on the record in this case, the Supreme Court of Ohio stated:

> "The rule prevailing in Ohio and elsewhere is that, where, in a negligence action, an interrogatory is submitted to the jury, in which the jury is asked to specify what acts of negligence, if any, are chargeable to the defendant, only those acts specified by the jury in its answer should be considered, and it will be accepted that other claimed acts of negligence on the part of the defendant were found by the jury not to have been established."

In holding that only those acts of negligence specified by the jury in its answers to interrogatories should be considered, and other claimed acts of negligence on the part of the respondent were found by the jury not to have been established, the Supreme Court of Ohio applied a rather universal rule of reason.

The Supreme Court of Ohio has subverted no federal, or other, right of the petitioner. The complaint that it was the narrow holding of the Supreme Court of Ohio and not the jury that found the respondent not guilty of specifications of negligence (1), (2) and (4) is not an accurate appraisal of the record or of the petitioner's alleged federal rights.

The trial court instructed the jury that it was the sole judge of the facts (R. 159). The court then proceeded to enumerate each specification of negligence charged against the respondent (R. 161) and permitted the jury to retain the pleadings "to keep clearly in mind the issues presented for your consideration" (R. 160). During the course of the charge to the jury, the trial court stated (R. 167):

> "But if you find by a preponderance of all the evidence in this case that the defendant was negligent *in one or*

more of the several allegations of negligence claimed in plaintiff's petition, and you further find by a preponderance of the evidence that such negligence of the defendant was, in whole or in part, the proximate cause of plaintiff's injuries, then you will proceed to inquire and determine whether or not plaintiff, himself, was negligent and whether plaintiff's own negligence directly contributed to cause his own injuries."

The trial court's charge did not limit the jury in its findings. Indeed, it is not contended on behalf of the petitioner that there was any error in the trial court's charge. The jury was requested to state without limitation of what the respondent's negligence consisted. It could have found, under the trial court's charge, or in answer to the interrogatories, if it found from the evidence, that the respondent was guilty of every act of negligence charged in the petition. The jury did not find the respondent negligent with respect to specifications of negligence (1), (2) and (4), but answered the interrogatory in the wording of the petitioner's third specification of negligence.

The basic contention of the petitioner seems to be that he was deprived of a trial by jury through Supreme Court of Ohio's interpretation of Ohio Revised Code, Section 2315.17. However, in *Walker v. New Mexico and S. P. R. Co.*, 165 U. S. 593 (1887), such statutes were held not to be in violation of the litigant's trial by jury.

Furthermore, it is impossible to see how any right of the petitioner has been subverted, federal or otherwise, by the application of Ohio Revised Code, Section 2315.17, interpreted as it was by the Supreme Court of Ohio. The Federal District Court for the Northern District of Ohio sitting at Cleveland, in a case in which the plaintiff was represented by the same office that represents petitioner herein, held in *Gelfand v. Strohecker*, 150 F. Supp. 655 (1956):

"Because the jury did not find in its answer to Interrogatory No. 1, that the defendant was guilty of any of the four specifications of negligence charged, this operated as a finding against the plaintiff, who had the burden of proof."

In holding as it did in the *Gelfand case*, the District Court cited *Masters v. New York Central R. Co.*, 147 Ohio St. 293, 70 N. E. 2d 898 (1947). However, there can be no doubt that the District Court was construing and applying Rule 49, Federal Rules of Civil Procedure. See *Cohen v. Travelers Ins. Co.*, 134 F. 2d 378 (7th Cir. 1943).

Inasmuch as the construction and application of Ohio Revised Code, Section 2315.17 by the Supreme Court of Ohio is the same as the Federal District Court's construction and application of Rule 49(b) of the Federal Rules of Civil Procedure, the petitioner could not have been deprived of any federal right by the decision of the Supreme Court of Ohio.

CONCLUSION.

Title 45 U. S. C., Section 51, governs not only the rights of the petitioner herein, but those of the respondent. Section 51 provides that the respondent's liability for an injury to the petitioner must result "in whole or in part from the *negligence*" of the respondent. Until the Congress provides that the respondent's liability shall be that of an *insurer* of its employees and removes *negligence* as the basis of its liability, it is respectfully submitted that the petition for writ of certiorari herein should be denied.

Respectfully submitted,

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Dated: July 15, 1959.

APPENDIX.

Rule 49(b) of the Federal Rules of Civil Procedure.

RULE 49. *Special Verdicts and Interrogatories*

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial.